

MINUTES

**Supreme Court's Advisory Committee
on the Rules of Professional Conduct**

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114-0241

November 16, 1998 - 5:15 P.M.

PRESENT

Commissioner Arnett
Robert Burton
Karma Dixon
Judge Thomas Kay
Judge Ronald Nehring
Kent Roche
Gary Sackett
Billy Walker
Earl Wunderli

EXCUSED

John Beckstead
Gary Chrystler
William Hyde

GUEST

Scott Reed, Attorney General's Office

STAFF

Peggy Gentles

I. WELCOME AND APPROVAL OF MINUTES

With one change, Gary Sackett moved that the minutes of the September meeting be approved. The motion was seconded. The motion passed unanimously.

II. RULE 4.2

Peggy Gentles stated that Justice Zimmerman had asked that the Committee consider Rule 4.2 as proposed by the Conference of Chief Justices. Ms. Gentles reminded the Committee that the CCJ had proposed a draft 4.2 in December 1997. This draft was largely a result of negotiations between CCJ and the U.S. Attorney General. At the summer CCJ meeting, the conference adopted a resolution stating that due to a lack of consensus around the issues, any action would be premature. However, the conference encouraged the various supreme courts to continue the discussion. Ms. Gentles stated that Justice Zimmerman had been involved in the drafting of Rule 4.2 and had been asked to continue his involvement by the Conference of Chief Justices. Ms. Gentles stated that Mr. Wims from the Attorney General's office had contacted her concerning the status of the Committee's consideration of the proposed 4.2. He informed her that a few years ago a statutory change had been proposed to address many of the issues surrounding Rule 4.2 as it applies to prosecutors. The proposal was withdrawn pending the Supreme Court's consideration of changes to Rule 4.2. After speaking with Mr. Wims, Justice Zimmerman was contacted and Justice Zimmerman asked that the

Committee consider 4.2. Ms. Gentles stated that the rule was on the Committee's agenda so that the Committee can decide how it would like to proceed.

Commissioner Arnett stated that any consideration by the Committee would be premature. The Committee has not received any of the information considered by the Conference of Chief Justices. Kent Roche stated that the ABA has not taken a position on the draft 4.2. Mr. Roche stated that he believed legislation may have overruled the "Reno Rule."

Karma Dixon stated that her sense was that the proposed changes to Rule 4.2 had been on a fast track. She stated that she had asked Scott Reed from the Attorney General's Office to accompany her to this meeting in case the Committee had any questions of Mr. Reed. She stated that while a great deal of work had been done on the national level, little activity had taken place on the state level. Mr. Arnett made a motion that the information that was presented to the Conference of Chief Justices be acquired so the Committee could consider it. Kent Roche seconded the motion. The motion passed unanimously. Billy Walker stated that the Bar Commission had agreed not to enforce Rule 4.2 until the issues were resolved. Commissioner Arnett moved that Robert Burton contact Justice Stewart and ask Justice Stewart if the court was interested in receiving alternatives to the draft of 4.2. Mr. Burton was asked to express the sense of the Committee that a proposal from the Committee would probably look markedly different than the draft rule. Judge Nehring seconded the motion. The motion passed unanimously.

III. RULES OF INTEGRATION AND MANAGEMENT

Gary Sackett reminded the Committee that there are two bodies of rules that purport to control attorney conduct. The first is the Rules of Professional Conduct and the second is the Rules of Integration and Management. An ad hoc committee consisting of Mr. Sackett, Earl Wunderli, Mr. Walker and Bar Commissioner Debra Moore had been formed to make recommendations concerning whether any changes should be made to either bodies of rules. The motivating concern of the ad hoc committee was that all rules governing attorney conduct should be in the Rules of Professional Conduct. Mr. Sackett stated that most of the discussion surrounded the final five Rules of Integration and Management. Mr. Sackett reported that the ad hoc committee had met three times and had prepared a recommendation. That recommendation had been faxed to Committee members the Friday prior to the meeting. Mr. Sackett reviewed the recommendations of the Committee. Commissioner Arnett stated that he had been very impressed with the Committee's work. Judge Nehring agreed and stated that the Committee's willingness to remove material from the Rules of Integration and Management was admirable. Billy Walker reported that if any Committee member was interested in seeing the source documents from which the ad hoc committee had worked they were available.

Commissioner Arnett moved that the Committee adopt the recommendations of the ad hoc committee. Judge Kay seconded the motion. The motion passed unanimously. Commissioner Arnett stated that the two recommendations within the purview of the Rules of Professional Conduct Committee were the amendment to the preamble of the Rules of Professional Conduct concerning

the attorney oath and the proposed change to Rule 9 of the Rules of Lawyer Discipline and Disability.

Billy Walker stated that his office was currently in the process of developing some proposed “clean-up” amendments to the Rules of Lawyer Discipline and Disability. He suggested that the ad hoc committee’s proposed change to Rule 9 could be added to that group. Ms. Gentles pointed out that the Rules of Lawyer Discipline and Disability have been amended in two different fashions. One is through the advisory committee and second is through a petition by the Bar commissioners directly to the Supreme Court. Karma Dixon asked that Mr. Burton contact Justice Stewart concerning the role of the Committee related to the Rules of Lawyer Discipline and Disability. Commissioner Arnett reminded the Committee that those rules were originally developed by a subcommittee of the Rules of Professional Conduct Committee. Gary Sackett stated that the Committee’s action should be reported to Bar Commissioner Moore who could take the recommendations concerning the Rules of Integration and Management to the Bar Commission. He suggested that a letter from Mr. Burton may be appropriate. Commissioner Arnett stated that the rules subcommittee would look at drafting the change to the preamble and have that proposal for the next meeting.

IV. OTHER ISSUES

Robert Burton distributed a letter that he had written to Justice Stewart reporting back on the Committee’s actions concerning the issues surrounding the Singleton decision.

V. FUTURE AGENDA ITEMS

Gary Sackett reported that the Ethics Advisory Opinion Committee in 1993 had been asked whether a lawyer could participate in a for-profit lawyer referral service. Rule 7.2 currently limits participation to “not-for-profit” lawyer referral services. The Ethics Advisory Opinion Committee at the time had felt bound by the plain language of the rule stating that only referral services that were not-for-profit were appropriate. However, the committee felt that the distinction between not-for-profit and for-profit did not make sense. A change to Rule 7.2 eliminating that distinction had been initiated but not ever completed. Judge Nehring asked why every lawyer could not become a “for-profit referral service” if the rule change were adopted. Billy Walker stated that the Office of Professional Conduct has informed lawyers that the fee-splitting provisions of Rule 1.5 may be implicated in a for-profit referral service and any lawyer involved in running such a service would need to prove that Rule 1.5 was not being violated. Gary Sackett made a motion that the Rules Subcommittee consider the proposed change to Rule 7.2. Earl Wunderli seconded the motion. The motion passed unanimously.

Tom Kay stated that the Committee may want to look at the issues in Rule 1.13 after the Supreme Court issues a ruling in the Short v. Salt Lake County. The county attorney in that case is claiming that the county commissioners are not “clients” under Rule 1.13 and therefore a duty of confidentiality does not run between the commissioners and the county attorney.

Karma Dixon stated that an issue has been arising, especially in the domestic arena. In cases, lawyers who appear in court and enter into agreements on behalf of their clients when the clients are not

present, judges are unwilling to find contempt for violating the agreements when the client has not clearly received information concerning the court's order. Because it is not possible for lawyers to send the court's order to the other party if that party is represented, enforcement has become difficult. Ms. Dixon stated that she also has a concern about lawyers lying under oath. She sees an increase in such unethical behavior.

After moving the Committee's next meeting from December 21, 1998 to December 14, 1998, the Committee adjourned.